

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Filed Electronically: July 13, 2018

IDEKER FARMS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,)	Case No.: 1:14-cv-00183-NBF
v.)	
)	Senior Judge Nancy B. Firestone
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

**UNITED STATES' RESPONSE TO PLAINTIFFS' COMBINED REPLY TO THE
UNITED STATES' RESPONSE TO PLAINTIFFS' BRIEF REGARDING THE IMPACT
OF *ST. BERNARD PARISH* ON PLAINTIFFS' MOTION FOR RECONSIDERATION
AND PLAINTIFFS' SUR-REPLY TO THE UNITED STATES' REPLY IN SUPPORT OF
ITS MOTION FOR RECONSIDERATION**

The United States files this response to plaintiffs' combined reply and sur-reply, dated July 6, 2018. *See* Pls.' Combined Reply to the United States' Resp. to Pls.' Br. Regarding the Impact of *St. Bernard Parish* on Pls.' Mot. for Recons. and Sur-Reply to United States' Reply in Supp. of its Mot. for Recons. ("Plaintiffs' Sur-Reply"), ECF No. 447. Pursuant to the Court's June 21, 2018 Order, the United States limits its response to the new arguments raised by plaintiffs. *See* Order dated June 21, 2018, ECF No. 446.

Plaintiffs' Sur-Reply adds new terminology to many of the same arguments regarding the impact of *St. Bernard Parish* on this litigation. The United States does not address that new terminology because the United States' previous briefs already refute plaintiffs' arguments and because the Court plans to hold oral argument on the parties' respective motions for reconsideration. It is appropriate, however, to address plaintiffs' new waiver argument.

Plaintiffs mistakenly contend that the United States waived the right to argue that plaintiffs' claims fail because of their reliance on "inaction or failure to act," instead of "affirmative government acts." *St. Bernard Parish v. United States*, 887 F.3d 1354, 1361 (Fed.

Cir. 2018); Plaintiffs' Sur-Reply at 1-2. This is untrue; it is always plaintiffs' obligation to establish that affirmative government action effected a claimed taking. Plaintiffs have not cited any authority supporting the proposition that the United States can "waive" an affirmative element of plaintiffs' cause of action on which plaintiffs bear the burden of proof. Plaintiffs raised the action-inaction issue in their first brief addressing the impact of *St. Bernard Parish* on their motion for reconsideration, thus opening the door to whether plaintiffs' relied on inaction by the United States, instead of affirmative actions. *See* Pls.' Reply to the United States' Resp. to Pls.' Mot. for Recons. at 25-28, ECF No. 434. The United States responded to that argument—showing that the Court had found that plaintiffs' own evidence regarding increased water surface elevations was based, in part, on the "failure to maintain" the BSNP. *See* United States' Resp. to Pls.' Br. Regarding the Impact of *St. Bernard Parish* on Pls.' Mot. for Recons. at 11, ECF No. 441 (quoting *Ideker Farms, Inc. v. United States*, No. 14-183L, 218 WL 1282417, at *38 (Fed. Cl. Mar. 13, 2018)). The United States did not, and was not required to, separately address plaintiffs' impermissible reliance on "inaction or the failure to act" to prove causation in the United States separate motion for reconsideration. Even so, plaintiffs have now had yet another opportunity to address their reliance on "inaction or the failure to act," choosing to sidestep that issue with their unfounded waiver argument, instead of directly responding to the evidence that plaintiffs did, in fact, impermissibly rely on "inaction or the failure to act" to attempt to prove causation.

Respectfully submitted July 13, 2018.

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